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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BILLY LEE ARLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the petitioner was convicted in Count One of a conspiracy offense and in Count Eight of a substantive steroid offense on a basis not alleged in the indictment and not shown to be considered by the grand jury in violation of the *Fifth Amendment* to the *United States Constitution*.

Whether the allegations contained in Counts One and Eight of the indictment were constitutionally deficient in that petitioner was not fairly apprised of the charges against which he had to defend.

Whether the district court and Court of Appeals erred in concluding that the penalty provisions of 21 U.S.C. § 333(b), which elevated a violation of any provision of § 331 from a misdemeanor to that of a felony upon proof of an intent "to defraud or mislead", were applicable to conduct evidencing only an intent "to defraud or mislead" the government, as opposed to customers or users of steroids.

LIST OF PARTIES

The United States of America

Billy Lee Arlen

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on October 31, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 947 F.2d 139 (1991), and is reprinted in the appendix hereto, page 1a, *infra.*

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on October 31, 1991, entered its opinion affirming the judgment of the district court. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

Grand Jury Indictment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .

Due Process of Law

. . . nor be deprived of life, liberty, or property, without due process of law.

Sixth Amendment

Notice

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 331(a) — *Prohibited Acts*

(The following acts and the causing thereof are prohibited:)

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

21 U.S.C. § 333 — *Penalties — Violations of Section 331 of this Title*

(a) Any person who violates a provision of Section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, if any person . . . commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States government alleging a violation of 18 U.S.C. § 371; 21 U.S.C. § 331(a); 21 U.S.C. § 333(b); and 18 U.S.C. § 2.

STATEMENT OF THE CASE

The petitioner, Billy Lee Arlen, was indicted by a federal grand jury in the Houston Division of the Southern District of Texas and accused of conspiracy, two counts of promoting and carrying on an unlawful business by means of the postal service, and five substantive counts of introducing and delivering and causing to be introduced and delivered for introduction into interstate commerce prescription drugs, namely, steroids, with the intent to defraud and mislead, proscribed respectively, by 18 U.S.C. § 371; 18 U.S.C. § 1342 and

§ 2; and 21 U.S.C. § 331(a), § 333(b)[1] and 18 U.S.C. § 2.

Jury selection commenced on May 30, 1990 before the Hon. Melinda Harmon, presiding; however, due to various rulings by the district court, the petitioner was re-arraigned on the following day, May 31, 1990, and entered a conditional plea of guilty, pursuant to Rule 11(a)(2), Fed. R. Crim. P., to Counts One (1) (conspiracy) and Eight (8) (distributing misbranded drugs in interstate commerce). The petitioner secured specific permission from the district court to appeal the issues preserved herein. On August 17, 1990, the petitioner was sentenced to a term of imprisonment of twelve (12) months and a three year period of supervised release as to each count, to run concurrently. In addition, a fine of $25,000 per count, also to run concurrently was assessed. Timely written notice of appeal was thereafter given. Bond was granted pending appeal, as was the petitioner's Motion to Stay payment of fine and special assessments.

Relative to the conspiracy allegation (Count One), the grand jury averred, in pertinent part, that—

> "Beginning in or about 1985, the exact date being unknown to the grand jury, and continuing up to and including April 15, 1988, in the Southern District of Texas and elsewhere, BILLY LEE ARLEN, Defendant, did unlawfully, *knowingly and willfully conspire*, combine, confederate, and agree with persons known and unknown to the grand jury to *commit offenses against the United States, that is to violate the federal Food, Drug, and Cosmetic*

1. 21 U.S.C. § 333(b) has been recodified as 21 U.S.C. § 333 (a)(2). *See, Prescription Drug Marketing Act*, Pub.L. No. 100-293, 102 Stat. 99 (1988).

> *Act, Title 21, United States Code, § 331 and § 333 by distributing in interstate commerce with the intent to defraud and mislead, certain prescription drugs* that were misbranded within the meaning of Title 21, United States Code, § 353(b)(1)(B) in that they were dispensed without the authorization of a prescription from a practitioner licensed by law to administer such drugs."

As to Count Eight, the distributing in interstate commerce of misbranded drugs, (namely anabolic steroids), with the intent to defraud and mislead allegation, the grand jury alleged, in pertinent part, that—

> "On or about the date listed below, within the Southern District of Texas, defendant, BILLY LEE ARLEN, with the intent to defraud and mislead, did introduce and deliver and cause to be introduced and delivered for introduction into interstate commerce from Houston, Texas, to the below-listed locations, quantities of prescription drugs, namely steroids . . .

DATE	DRUG	RECIPIENT
03/08/88	Nandrolone Decanoate	Joey Alexander (Starksville, MS)"

By order duly entered on November 21, 1989, both the government and the defense were ordered to submit proposed jury instructions to the court no later than January 12, 1990. While the petitioner dutifully complied with the court's directive and tendered proposed jury instructions on January 12, 1990, the government did not. In fact, as is reflected by the record, the government filed with the district court its proposed jury instructions and served defense counsel with a copy of the same, on May 25, 1990—the date of the pre-trial conference. At the same time, the prosecution filed what

it styled, Government's Memorandum in Support of Proposed Jury Instructions (hereinafter referred to as "Memorandum").

Near the conclusion of the pre-trial conference, the government broached the fact that it was expecting an issue would probably be raised "regarding the intent to defraud element":

> "Your Honor, one — one other matter. I don't know what your practice is (in) terms of when they have a charge, to the jury instructions. We are anticipating possibly an issue regarding the intent to defraud element of — of the charges and towards that end we filed a, or we are filing today, a brief that discusses our position on the issue. How you rule on that issue — it's hard to explain it at this point, but how you rule on that will affect somewhat what our evidence is and — and particularly the questions of whether we should in opening statement point out that theory or not is one — is something we'd like advanced notice on, if possible . . . But, if Your Honor has had (an) opportunity and has some idea on whether or not that particular theory is going to be instructed to the jury in one fashion or another, it would be helpful to us to know that ahead of time. I'll — we'll be filing the materials today, so you'll know what I'm talking about." (Vol. 3 - 22-23)

"That particular theory" is the genesis of the issues raised herein.

As the aforementioned memorandum explained, Petitioner Arlen had been indicted and accused of a conspiracy to violate the Federal Food, Drug, and Cosmetics Act (FDA), two counts of using fictitious names and addresses to conduct an unlawful business through the

mail, and five substantive counts of causing the introduction of prescription drugs into interstate commerce without a prescription. The government asserted that "[i]n substance, the indictment charges that the defendant knowingly and wilfully entered into a criminal conspiracy with others to cause the introduction into interstate commerce of anabolic steroids, androgenic hormones, and other prescription drugs." (Vol. 1 - 320) The anabolic steroids that the government contended were distributed by the petitioner constituted "prescription drugs" because "the drug is unsafe for humans without the supervision of a licensed practitioner." *See* 21 U.S.C. § 353(b)(1)(B). The government argued that the statutory scheme provides that if a "prescription drug" is dispensed without a prescription prepared by a licensed practitioner that drug becomes "misbranded" by the very terms of 21 U.S.C. § 353(b)(1).

At the time of the alleged violations herein, whether a petitioner acted with "intent to defraud or mislead" was of paramount concern in that a finding of the existence of that constituent element elevated the conduct from a misdemeanor to a felony.[2] As the government acaccurately stated in its memorandum, the defense never disputed the fact that the petitioner had sold or given away steroids during the time frame in question. The gravamen of the case centered on whether he did so with an "intent to defraud or mislead." The prosecution asserted on the eve of trial, and needless to say, *outside the accusatory pleading,* that

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2. Although not germane to the case at bar, Congress has amended the law, adding § 333(e)(1), effective November 18, 1988, making it a felony to introduce steroids into interstate commerce *regardless* of the actor's intent.

> "[i]t is the government's theory of the case that the defendant acted with the intent to defraud or mislead *both* the federal and state agencies responsible for enforcing standards of drug safety (United States Food and Drug Administration (FDA), the Texas State Board of Pharmacy, and the Division of Food and Drugs of the Texas Department of Health), *and* the ultimate consumer of the anabolic steroids" (Vol. 1 - 323) (emphasis added)

As the prosecution boldly asserted, "[t]he plain language of this statute, its legislative history, and relevant case law support the government's theory that defrauding or misleading either of these groups constitutes a felony under 21 U.S.C. § 333(b)". (Vol. 1 - 323) It argued that "the intent to defraud or mislead can be established with proof that the defendant intended to defraud *federal and state enforcement agencies,* and not merely the ultimate consumers of the prescription drugs." (Vol. 1 - 323) (emphasis added)

On the first day of trial, May 30, 1990, defense counsel voiced objection to the government's theory of prosecution espoused in the aforementioned memorandum. Not only was it not clear that the grand jury had even considered the government's unique theory of prosecution when it indicted the petitioner, the prosecution's assertion that it could discharge its burden of proving an "intent to defraud or mislead" by a mere showing that the government had been mislead, or kept in the dark, or somehow, been prevented from discharging its regulatory function was labeled for what it was — specious. The petitioner found himself in a most untenable position: having to defend against allegations for which he was not indicted, nor properly notified of, and which were not supported by a fair construction of the statute.

The district court ultimately concluded that § 333(b) encompassed an "intent to defraud or mislead" the government theory and, overruled the petitioner's objections. The following day, May 31, 1990, the petitioner was re-arraigned and entered conditional pleas of guilty pursuant to Rule 11(a)(2), Fed. R. Crim. P., specifically preserving for appellate review the issues raised herein —

(A) The government alleged a conspiracy to *violate the laws of the United States*, not a conspiracy *to defraud the United States*. Allowing conviction of the petitioner on a mere showing of an intent to defraud the United States, a federal agency, or any state regulatory entity, would violate an accused's constitutional right to have a grand jury pass on the specific facts and theory of the prosecution;

(B) Authorizing conviction on an "intent to defraud or mislead" the government theory, is not countenanced by § 333(b); and

(C) The petitioner was not adequately apprised in the indictment of the nature of the charges against him.

Conditional pleas of guilty were entered as to the conspiracy allegation (Count One) and substantive steroid allegation (Count Eight) with the specific proviso that "[w]e enter a plea . . . but not to conspiracy or any substantive offense involving *an intent to defraud or mislead an individual*." (Vol. 5 - 50) (emphasis added) The prosecution was of the view that if "there be a showing that the government's regulatory scheme was intended to be evaded, was intended to be impeded . . . that . . . in our estimation that would be felonious conduct . . ." (Vol. 5 - 50).

At the conclusion of the re-arraignment, the district court made the following finding:

> *"I don't think there is sufficient evidence at this juncture to establish that there was an intent to defraud a consumer or a supplier — or a consumer or purchaser; however, I do think there was sufficient evidence to establish that there was intent to defraud the government or to evade the government's regulatory scheme by the various things that you've pointed out. So, I will make that very clear — to whomever (sic) is reading this record."* (Vol. 5 — 50-51) (emphasis added)

Based upon the government's proffer of proof, as well as the testimony of the petitioner, the district court concluded that the peitioner

> "engaged in a scheme to keep the government from finding out what he was doing by specific purpose of keeping—doing his business without having the government regulators coming in and regulating him and overseeing what he was doing. *So, that's enough for me to accept the plea* when it comes time to accept the plea." (Vol. 5 - 51) (emphasis added)

The Court of Appeals rejected the petitioner's contention that the indictment herein did not fairly allege the offenses for which he was convicted. When confronted with the assertion that the accusatory pleading did not aver that the petitioner acted with an intent to defraud or mislead a governmental entity, and therefore, it could not be ascertained *with any degree of certainty* that the grand jury had considered this novel theory in returning the indictment, the Court of Appeals reasoned that, "[t]he indictment alleges that Arlen de-

frauded or misled someone; *the proof would have specified whom that was.*" *See,* p. 11a [144 of opinion], *infra.* (emphasis added)

Although the Court of Appeals recognized that "[t]he Count (Eight) on its face does not specify that Arlen committed his offenses with the intent to defraud or mislead the government", it was of the view that the petitioner could not have reasonably "read this Count as charging him with defrauding the purchaser of the drugs. The indictment is silent as to the identity of the defrauded or misled victim." *See,* p.——[145 of opinion], *infra.* This holding is puzzling, to say the least, in light of the fact that the *government* read both Counts (One and Eight) to support prosecution of the petitioner for *defrauding the purchaser of the drugs:*

> "[i]t is the government's theory of the case that the defendant acted with the intent to defraud or mislead *both* the federal and state agencies responsible for enforcing standards of drug safety (United States Food and Drug Administration (FDA), the Texas State Board of Pharmacy, and the Division of Food and Drug of the Texas Department of Health), *and the ultimate consumer of the anabolic steroids.*" (Vol. 1 - 323) (emphasis added)

In fact, before it was all over, the prosecution asserted that the indictment fairly charged that the petitioner acted with an "intent to defraud either customers or the government *or the drug companies* . . .". (Vol. 4 - 38) (emphasis added)

Moreover, in pretrial discovery the government tendered to the defense results of laboratory analysis that purportedly showed that the steroids purchased by Joey

Alexander, the named recipient in Count Eight of the indictment, contained *only 36.7%* of the declared amount of Nandrolone Decanoate. Each substantive count, as well as several of the overt acts alleged in the conspiracy charge, identified the recipients of the steroids that the petitioner sold to or traded with. Laboratory analysis provided by the prosecution showed similar alleged discrepencies between reported steroid levels and actual chemical composition. It was therefore imminently reasonable for the petitioner to have "read this Count as charging him with defrauding the purchaser of the drugs."

As to the petitioner's contention that constitutionally inadequate notice was provided in both counts of the indictment, the Court of Appeals held that the indictment tracked the language of the statute and as long as all "required elements are included in the statutory language" that sufficient notice was afforded. *See*, p. 12a [145 of opinion], *infra*. The Court of Appeals noted that the petitioner

> "did not request a bill of particulars on this issue, nor even moved to quash the indictment; instead, he pled guilty. While not conclusive, this further indicates that the indictment was sufficient. In addition, Arlen admits that he had read *Bradshaw v. United States*, 840 F.2d 871 (11th Cir.), *cert. denied*, 488 U.S. 924, 109 S. Ct. 305, 102 L.Ed.2d 324 (1988)) well in advance of this plea. The defrauding-the-government theory was not a surprise." p. 14a [146 of opinion], *infra*.

The problem with the Court of Appeals' analysis in this regard, as will be discussed *infra*, is "that a bill of particulars cannot save an invalid indictment." *Russell v. United States*, 369 U.S 749 (1962). As far as the petitioner's

purported failure to move to quash the indictment is concerned, it is noted that the Federal Rules of Criminal Procedure have *expressly abolished the same. See* Fed. R. Crim. Pro. 12(a).

The suggestion by the Court of Appeals that the entry of a plea of guilty by the petitioner "indicates that the indictment was sufficient", p. —— [146 of opinion], *infra*, is equally flawed. Each issue raised herein was expressly reserved for appellate review pursuant to Fed. R. Crim. Pro. 11(a)(2). *See* Advisory Committee Note to Rule 11(a)(2), Amend. to Fed. R. Crim. Pro., 97 F.R.D. at 278-279.

Any implied notion of waiver or acquiescence in deficient notice by the petitioner's entry of conditional pleas is contrary to the rationale underlying Rule 11(a)(2)'s promulgation.

Finally, the fact that the petitioner had read *United States v. Bradshaw, supra,* prior to the entry of the conditional pleas of guilty is of little moment. Not only was *Bradshaw* not binding precedent in the Fifth Circuit, the specific questions raised herein were not at issue in *Bradshaw*. That is to say, the constitutional questions concerning adequacy of notice and the right to be prosecuted only for the specific allegation considered by the grand jury were not raised in *Bradshaw*. In fact, petitioner had every right to believe that the prosecution's "governmental entities" theory would not wash in the Fifth Circuit, in light of *United States v. Haga,* 821 F.2d 1036 (5th Cir. 1987).

Although the accusatory pleading in *Haga* specifically alleged that he acted "with the intent to defraud and mislead the FDA, the Texas State Board of Pharmacy,

and the Division of Food and Drugs of the Texas Department of Health . . .", and therefore did not implicate the Fifth and Sixth Amendment concerns at issue in the case *sub judice*, the Court of Appeals observed in *Haga* that

> "[a]lthough we do not decide whether the government's original theory of this case (defrauding or misleading regulatory entities as opposed to purchasers constitutes an offense) is sustainable, we observe that the theory would as a practical matter have the effect of rendering the 'defraud and mislead' language of Section 333(b) mere surplusage in the prosecution of any defendant charged with a conscious (and not publicly proclaimed) violation of Section 331—only inadvertent (or publicly announced) violations of Section 331 would be misdemeanors, because all conscious (and not publicly confessed) violations would necessarily involve a deliberate evasion of established regulatory systems" at 1044-1045, n. 17.

Bradshaw had not been adopted or followed by the Fifth Circuit until the Court of Appeals issued its opinion in the case at bar. As the Court of Appeals reasoned, "we have not previously decided this question, (although) three other circuits have, and all three have agreed with the government's position here." p. 6a [142 of opinion], *infra*, citing, *United States v. Bradshaw, supra*, and two other cases decided while the present case was on direct appeal but *after* the petitioner's entry of conditional pleas—*United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991); *United States v. Cambra*, 933 F.2d 752 (9th Cir. 1991). Neither *Mitcheltree* or *Cambra* involved the Fifth and Sixth Amendments issues raised herein. In any event, as the Court stated in *United States*

v. Haga, supra, and which is clearly applicable to both Counts One and Eight herein, "[w]e are unable to conclude with *fair certainty* the grand jury determined there were grounds to indict appellant for . . . (defrauding) the United States (or any federal agency)", *Id.,* at 1045.

The Court of Appeals ultimately held that the prosecution's "governmental entities" theory was sustainable and "consistent with the structure of the statute". While recognizing that "[c]ritically . . . the statute does not specify *who* must be defrauded or misled to trigger the felony provisions of § 333(b)", the Court concluded that the reasoning of *Bradshaw* was sound: " 'Congress meant to encompass conduct intended to defraud government enforcement agencies.' " p. 6a [142 of opinion], *infra.* (emphasis in original)

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's holding that the petitioner was not denied his Fifth Amendment right to be tried only for those offenses actually considered by the grand jury cannot be squared with decisions of this Court and other Circuits.

Without fully and directly confronting the issue raised herein, the Court of Appeals did no more than pay lip service to the admonition of this Court in the seminal case of *Russell v. United States,* 369 U.S. 749 (1962), that a grand jury indictment must sufficiently and fairly apprise the defendant of " 'the specific offense, coming under the general description' of what he is accused." *Id.* at 768. An essential purpose of a grand jury indict-

ment is " 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.' " *Id.* at 768. As the Court reasoned,

> "the rule is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task.
>
> . . .
>
> A grand jury, in order to make that ultimate determination, (whether a specific crime has been committed) must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. *For a defendant could then be convicted on the basis of facts not found by, perhaps not even presented to, the grand jury which indicted him*" *Id.* at 768-770 (emphasis added)

In *Stirone v. United States*, 361 U.S. 212, 215-216, (1960), the Court stressed the solemnity of the constitutional requirement that felonies be instituted by grand jury indictment and "that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." It is a fundamental tenet of American law that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id.* at 217. The Court determined that the defendant therein had been subjected to the possibility of being convicted on a "new basis"

or theory of prosecution not contained in the indictment. As the Court held,

> "[w]hile there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217.

In *Dunn v. United States*, 442 U.S. 100, 107 (1979), the Court re-affirmed that "the most basic notions of due process" require that a defendant cannot be "convicted on a charge (not) alleged in the indictment . . .". A defendant has a "right to be heard on the *specific* charges of which he is accused." Id., at 106. (emphasis added)

The open-ended nature of the prosecution's pleading effectively undermined and thwarted the petitioner's constitutional right not to be subjected to the possibility of conviction on any basis other than that specifically considered by the grand jury that returned the indictment. The prosecution, with full approval of the district court and the Court of Appeals, was allowed to secure the convictions herein on its malleable "governmental entities" theory for which there was utterly no support in the indictment. The prosecution boldly asserted that it could discharge its heavy burden of establishing felonious conduct in the present case by showing that the petitioner had the intent to defraud or mislead *either* the federal government, regulatory agencies thereof, a state regulatory entity, pharmaceutical companies, or the actual purchasers or consumers of

steroids. Nary a clue is contained in the indictment which would reasonably support the argument that the grand jury in any way embraced the prosecution's "governmental entities" theory. *See United States v. Norris*, 281 U.S. 619, 622 (1930), holding that "*nothing* can be added to an indictment without the concurrence of the grand jury by which the bill was found." (emphasis added) and *United States v. Radetsky*, 535 F.2d 556, 562 (10th Cir. 1976), wherein it is stated, "[f]urthermore, and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guarantee and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to presented to, the grand jury that indicted him." *See also, United States v. Lane*, 765 F.2d 1376, 1380 (9th Cir. 1985); *United States v. Neal*, 692 F.2d 1296, 1392 (10th Cir. 1982); and *United States v. Cecil*, 608 F.22d 1294, 1296 (9th Cir. 1979).

The conclusion of the Court of Appeals that "[t]he indictment alleges that Arlen defrauded or misled someone; *the proof would have specified whom that was*", (emphasis added) p. 11a [Opinion at 144], cannot be reconciled with the jurisprudence of the Fifth Amendment. Of particular relevance herein, is *Ex parte Bain*, 121 U.S. 1, 10 (1887), where the Court addressed the very issue of whether it was of any constitutional significance that the grand jury or any member thereof, in returning the indictment, may have been of the view that the defendant acted *with an intent to deceive the comptroller*, as opposed to an *intent to deceive some other person*, in a prosecution for making a false report or statement as the cashier for the Exchange National Bank of Norfolk, Virginia. As the Court cogently observed:

> "[w]hile it may seem to the trial court with its better instructed mind in regard to what the statute requires to be found as to the *intent to deceive*, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. *How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else?*" (emphasis added)

The government simply cannot argue with a straight face that the indictment herein adequately met the bare constitutional minimum required by the Fifth and Sixth Amendments.

THE REQUIREMENT OF CLOSE SCRUTINY

Equally clear is the proposition that indictments brought "under the broad language of the general conspiracy statute *must be scrutinized carefully . . .*" *United States v. Dennis*, 384 U.S. 855 (1966). (emphasis added) As the Court held in *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977), "[t]he terms 'conspiracy' and 'defraud', when used together have a 'peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringement on basic values of our crimi-

nal law' " at 40. Instead, we must follow the general rule of *Dennis* . . . that indictments brought under § 371 must be *strictly construed*." *Id.* at 1842. (emphasis added) The case law is legend that a constructive amendment of the indictment is reversible error, *per se*. *United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988).

II.

The Fifth Circuit's holding that the petitioner was afforded adequate notice of the charges against which to defend is constitutionally insupportable and runs afoul of the settled jurisprudence of this Court, as well as decisions of other circuits.

The petitioner was never properly or fairly put on notice by the accusatory pleading that the prosecution would seek felony conviction by reliance upon an "intent to defraud or mislead" the government (or regulatory entities) theory. Although the constituent element of "an intent to defraud or mislead" was averred, *any* fair reading of the indictment fails to notify the accused that the government (or regulatory entities) was the alleged victim of the petitioner's conduct.

While the prosecution asserted both in its eleventh hour memorandum and argument to the district court that even a state regulatory entity qualified as a governmental unit that could be defrauded or misled, no such notice appears in the indictment. Although the indictment contains a statement or proclamation that "[t]he United States Food and Drug Administration was the agency of the United States responsible for, among other things, enforcing the provisions of the Federal Food, Drug, and Cosmetics Act, Title 21, United States Code, Section

301 *et. seq.*" (Vol. 1 - 136), it was never alleged that that entity or the federal government, in general, was the intended recipient of the petitioner's alleged "intent to defraud or mislead."

It is a fundamental, bedrock principle of constitutional jurisprudence that an accused shall be informed of the nature and cause of the accusation in order to prepare his defense. *Hamling v. United States,* 418 U.S. 37 (1974). In *Russell v. United States,* 369 U.S. 749 (1962), the Court held that an indictment must " 'contain the elements of the offense intended to be charged,' *and sufficiently apprise the defendant of what he must be prepared to meet.*' " (emphasis added) *See also, United States v. Tomasetta,* 429 F.2d 978, 979 (1st Cir. 1970). And, of course, the requisite specificity of the constituent element is constitutionally mandated so that the defendant "will not be misled while preparing his defense." *United States v. Welliver,* 601 F.2d 203, 207 (5th Cir. 1979).

The prosecution predictably argued on direct appeal that " 'an indictment needs only to allege each essential element of the offense charged so as to enable the accused to prepare his defense and allow the accused to invoke the double jeopardy clause in any subsequent proceeding' ", citing *United States v. Webb,* 747 F.2d 278, 284 (5th Cir. 1984) (Brief for Appellee at 35). The Court of Appeals observed that the indictment contained all the constituent elements of the statute and, therefore reasoned that "the language of the statute may guarantee sufficiency if all required elements are included in the statutory language." p. 12a [Opinion at 145] But this misapprehends the petitioner's argument. Merely reciting the constituent elements of an offense in an

accusatory pleading does not in all cases, satisfy Rule 7(c) (1), Fed. R. Crim. Pro., much less the Fifth and Sixth Amendments. It is axiomatic that "an indictment which does not apprise the defendant with reasonable certainty of the nature of the charges against him is defective *even though it tracks the language of the pertinent statute.*" *United States ex rel. Ballard v. Bengston*, 702 F.2d 656, 660, (7th Cir. 1983) (emphasis added). *See also Russell v. United States*, 369 U.S. 749, 765 (1962), wherein it is stated: "[a]n indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him . . . is defective, *although it may follow the language of the statute.*' ", *quoting, United States v. Simmons*, 96 U.S. 360, 362. (emphasis added)

In *United States v. Murphy*, 762 F.2d 1151 (1st Cir. 1985), the Court held that an indictment alleging a violation of 18 U.S.C. § 1512(a)(1) (tampering with a witness) which contained each constituent element of the offense and otherwise tracked or "parrot[ted] the statute", was nevertheless constitutionally flawed. Because the accusatory pleading did not specify "[w]hat the proceeding was to be . . .", the Court was of the view that "[o]n this indictment, it cannot be known what official proceeding the grand jury had in mind or the defendants must be prepared to meet", *Id.*, at 1153. In *Murphy*, as in the present case, "[t]he government kept its options open" and proceeded to trial on several theories seeking a felony conviction despite the fact that the indictment due to its open-ended wording, did not adequately "apprise[] the defendant of what he must be prepared to meet", *Id.*, at 1154, *quoting, Russell v. United States, supra* at 763. The constitutional infirmity in *Mur-*

phy was not objected to *in any way* in the trial court below, but rather was addressed for the first time on appeal. The Court of Appeals "notice(d) the defect on appeal as one which seriously affected the fairness, integrity, and public reputation of a judicial proceeding" and reversed the conviction, *Id.*, at 1155.

Viewing the indictment as a whole, the question that must be resolved is "whether the details of the indictment were as a practical matter, sufficient to apprise the presumptively innocent (defendant) of the charge (he was) required to defend." *United States ex rel. Ballard v. Bengston, supra* at 661.[3] And, in the *case sub judice*, it clearly was not. While the government argues that the petitioner did not seek explication of the indictment's asserted infirmity by way of a bill of particulars, this response is patently frivolous.[4] The open-ended nature of the prosecution's pleading effectively undermined and thwarted the petitioner's constitutional right not to be subjected to the possibility of conviction on any basis than that specifically considered by the grand jury that returned the indictment.

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3. It is the law that "[t]he rule that indictments after trial are liberally construed in favor of validity, *see, e.g., United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), does *not* apply . . . where the defendant timely challenge(s) the indictment before trial." (emphasis added) *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982). Sufficiency of an indictment is subject to a *de novo* review on appeal. *United States v. Buckley, supra*, at 897.

4. "[I]t is a settled rule that a bill of particulars cannot save an invalid indictment." *Russel v. United States*, 369 U.S. at 770. In *United States v. Winchester*, 407 F.Supp. 261 (D.C. Del. 1975), the Court held that the certainty which a prosecutor's bill of particulars might provide would not constitute legally proper substitute for a definite statement in the indictment concerning *what the grand jury had charged.*" *See also*, C. Wright, *1 Federal Practice and Procedure*, § 129 (1982).

Of particular relevance herein, is the requirement that the accusatory averment be specific and definite enough to prevent thwarting of the constitutional right to grand jury indictment. Thus, both Fifth and Sixth Amendment concerns are implicated:

> "These standards require that the defendant (1) shall be called to answer charges actually brought by the grand jury and not a prosecutor's interpretation of those charges; (2) be apprised of the charge against him in order to permit preparation of a defense; (3) be protected against double jeopardy." *United States v. Haas*, 583 F.2d 216, 219 (5th Cir. 1978), *reh. den.* 588 F.2d 829, *cert. den.*, 440 U.S. 981 (1979).

The requirement of specificity and definiteness "ensures that the grand jury charged such an offense and that critical parts of the charged offense were not subsequently contributed by the prosecutor alone." *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979), *cert. denied, sub nom., Gispert v. United States*, 445 U.S. 946 (1980).

Petitioner Arlen, over objection, was subjected to prosecution and convicted on a theory not fairly spelled out in the indictment. The pleading in dispute effectively eviscerated the protection of both the Fifth and Sixth Amendments that all citizens enjoy.

III.

The Fifth Circuit's analysis and the interpretation of § 333(b) runs counter to settled canons of statutory interpretation of this Court and results in the criminalization of conduct not fairly proscribed by the act.

At all times germane to the present case, 21 U.S.C. § 333(b) superceded the otherwise misdemeanor penalty provision of § 333(a) and called for felony punishment upon proof of either a prior final conviction under § 333 (a) or proof that any provision of § 331 was violated "with the intent to defraud or mislead."[5] The government argued in the present case that felonious misconduct existed because even if the petitioner had no "intent to defraud or mislead" any individual, recipient, or user of steroids, his clandestine operation acted to thwart governmental regulatory agencies in their policing of the dissemination of misbranded drugs. Relying on *United States v. Bradshaw*, 840 F.2d 871, 872 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 305, the prosecution asserted that the intent requirement of § 333(b) encompassed an intent to defraud or mislead a government enforcement agency. In *Bradshaw*, the record established that the defendant therein made affirmative misrepresentations to Florida state drug authorities in an effort to obtain a Florida drug wholesaler's permit. The government theorized that Bradshaw "had defrauded or misled both the

5. 21 U.S.C. § 333 was amended *after* the conduct described in the instant indictment allegedly was committed and does not concern us here. Now a new subsection—333(e) regulates the "[p]rohibited distribution of human growth hormones" and does away with an requirement that the government prove an "intent to defraud or mislead." Whoever distributes or possesses with intent to distribute human growth hormones is subject to a term of not more than five years imprisonment.

FDA and the Florida enforcement authorities." *Id.* at 873. The district court authorized the jury to convict "on any of three grounds: (1) that, Bradshaw intended to defraud natural persons; (2) that, Bradshaw intended to defraud a state law enforcement agency; or (3) that, Bradshaw intended to defraud a federal law enforcement agency." *Id.* at 873-874.

A panel of the Eleventh Circuit reasoned that the penalty provisions of § 333(b) applied to all violations of § 331 and because "[s]everal of the acts § 331 prohibits concern only the government", that ergo, "it is clear that the FDA is the entity most likely to be defrauded under the provisions. Thus, we conclude that Congress intended the 'intent to defraud or mislead' language of § 333(b) to extend to the FDA." *Id.* at 874. The Court was further of the view that

> "[t]he general scheme of the Act and its legislative history indicate that an overriding Congressional purpose was consumer protection — the protection of the public against any misbranded or adulterated food, drug, device, or cosmetic. *When Bradshaw misled the governmental agencies, thereby frustrating their efforts to protect the public, he indirectly misled and defrauded the public.* Thus, Bradshaw's actions fell squarely within the congressional purpose." *Id.* at 874 (emphasis added)

At least the panel of the Eleventh Circuit conceded that "this particular provision at issue has not been previously interpreted . . ." *Id.* at 875

The Fifth Circuit concluded that "[t]he government's interpretation of § 333(b) is consistent with the structure of the statute." p. 6a [Opinion at 142] The Court observed that

> "[s]everal of the twenty acts § 331 proscribes concern only the government. *See* 21 U.S.C. § 331(e) (Failure to permit FDA access to records and failure to make report to the FDA); § 331(f) (refusal to permit FDA inspection); § 331(p) (failure to register with the FDA). As the *Bradshaw* court noted, '[a]fter reading these sections with § 333, it is clear that the FDA is the entity most likely to be defrauded *under these provisions.*' *Bradshaw*, 840 F.2d at 874. Arlen's interpretation of § 333(b), that the government cannot be a defrauded or misled victim, would lead to the conclusion that there could never be a felonious violation of §§ 331(e), (f), or (p). Such a result would be contrary to the plain inclusive language of § 333(b), which contemplates both misdemeanor and felony violations for all § 331 offenses." (emphasis added) p. 6a [Opinion at 142]

Plainly, a host of conduct proscribed by § 331 implicates concerns unique to federal regulatory agencies such as § 331(e), which requires record keepers "to permit access to or copying of any record as required by § 373 of this title . . .", or § 331(f) which regulates "[t]he refusal to permit entry or inspection as authorized by § 374 of this title", or § 331(p), for example, which regulates "[t]he failure to register as required by § 360 of this title." Arguably, a person could run afoul of the felony penalty provisions of § 333(b) by violating the aforementioned sections with an "intent to defraud or mislead" the government or its regulatory entities.

But that was not what was at issue in the case at bar and certainly not what was alleged in the indictment. The government proceeded on the theory that the petitioner violated § 331(a) and § 331(b) by introducing or causing the introduction into interstate commerce of an adulterated or misbranded drug. The government did

not allege that any governmental entity was defrauded or misled, or for that matter, that the petitioner acted with that intent in mind. The Court of Appeals' assertion that the petitioner's interpretation of § 333(b) "would lead to the conclusion that there could never be a felonious violation of § 331(e), (f), or (p)" is simply incorrect. p. 7a [Opinion at 142] Some of the statute's proscriptions are amenable to a "governmental entity" construction. A fair reading of § 331(a) and (b), however, does not lend itself to such an interpretation. There simply is no clue offered in the text of § 331(a) and (b) that would suggest such a result.

The government asserted in its Memorandum in the district court, "that the FDC Act *should be construed liberally* to provide an adequate deterrent, and, more importantly, to effectuate the purpose of the Act—protection of the public health." (Vol. 1 - 327. For this rather extraordinary proposition, the government ostensibly relied on *United States v. Dotterweich*, 320 U.S. 277 (1943), *reh. denied*, 320 U.S. 815 (1943) and *United States v. Park*, 421 U.S. 658 (1975). But surely this is not the law. As the Court held in *United States v. Haga*, *supra*,

> "the government has advocated, both below and on appeal, a liberal construction of the Food, Drug, and Cosmetic Act on the theory that 'because the Act is a public health statute, it should be broadly construed to effectuate its public health purpose', *citing United States v. Park*, (citation omitted), and *United States v. An Article of Drug (Bacto-Unidisk)*, 394 U.S. 784, 89 S. Ct. 1410, 22 L.Ed.2d 726 (1909) . . . We find no suggestion in either decision that the Supreme Court views the Act as reversing the usual rules of construction applied to statutes de-

fining criminal offenses. *See United States v. Beam*, 686 F.2d 252, 258 & n. 10 (5th Cir. 1982)" *Id.* at 1039.

In *Beam*, the Court stated that penal statutes

> " 'are to be strictly construed in favor of the accused,' *United States v. Resnick*, 299 U.S. 207, 209, 57 S. Ct. 126, 127, 81 L.Ed.2d 127, 129 (1936), and their provisions must be explicit and unambiguous in order to sustain a criminal prosecution.' *M. Kraus & Bros. v. United States*, 327 U.S. at 621, 66 S. Ct. at 707 (1946). Moreover, it has long been recognized that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *Id.* at 258.[6]

While the *Haga* court chose not to grapple with the prosecution's "intent to defraud or mislead the government theory", the Fifth Circuit obviously did in the case *sub judice* and determined the matter adversely to the petitioner. The legislative history of the act, however, does not explain or offer insight into the meaning or reach of the felony provision in issue. *United States v. Haga, supra*, at 1024, n. 15.[7] It is hornbook law that "to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are

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6. "We note at the outset that our determination of the reach of a criminal offense statute is governed by 'the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved." *Smith v. United States*, 360 U.S. 1 (1959). *Haga* at 1038.

7. Even if the legislative history shed some light on Congress' thought process, which it does not, the rule is that "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that *clearly warranted by the text. Crandon v. United States*, 494 U.S. 152 (1990), as quoted in *Hughey v. United States*, 110 S. Ct. 1979 (1990). (emphasis added).

not *'plainly and unmistakably'* proscribed." *Dunn v. United States*, 442 U.S. 109, 112-113 (1979), quoting, *United States v. Gradwell*, 243 U.S. 476, 485, (1917). (emphasis added)

In the final analysis, what the prosecution has done is to make every effort to "felonize" misdemeanor misconduct by suggesting the existence of a legislative history and a corresponding Congressional intent which simply does not exist. Moreover, it has sloppily invoked rules of "liberal construction" in the name of Public Welfare Statutes that has no basis in the context of criminal prosecutions and which cannot be countenanced by the Constitution. If Congress in fact intended such a radical and revolutionary application of § 333(b) it should have said so. Based on the allegations herein and the specific provisions of § 331 involved, it was reversible error to allow the government to discharge its heavy burden of proving guilt beyond a reasonable doubt by merely attempting to show that the government (what specific entity we'll never know) had somehow been defrauded or misled.

PRAYER

For these reasons, the Petitioner respectfully prays that this Court will grant his Application for Writ of Certiorari.

Respectfully submitted,

By: _____

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APPENDIX A

NO. 90-2746.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BILLY LEE ARLEN,
Defendant-Appellant.

United States Court of Appeals,
Fifth Circuit.

October 31, 1991.

Defendant was convicted in the United States District Court for the Southern District of Texas, Melinda Harmon, J., pursuant to his guilty plea, of unlawfully conspiring to sell and selling steroids, and he appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) prosecution could establish requirement of intent to defraud or mislead, for imposing felony penalty for offense of introducing misbranded steroids into interstate commerce, by showing that defendant misled government agency rather than purchaser of drugs; (2) indictment was not constitutionally insufficient; (3) defendant was not prejudiced by district court's failure to advise him that he would face additional imprisonment if he violated conditions of supervised release; and (4) fraud guideline was properly applied in sentencing defendant.

Affirmed.

Appeal from the United States District Court For the Southern District of Texas.

Before BROWN, DAVIS, and BARKSDALE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Billy Lee Arlen pled guilty to charges that he conspired to sell and actually sold steroids in violation of 18 U.S.C. §§ 331(a), 333(b). Arlen conditioned his plea, however, on his ability to appeal the district court's interpretation of § 333(b) and the constitutional sufficiency of his indictment. In this appeal Arlen complains primarily that the district court erred in holding that the government could establish § 333(b)'s requirement of "intent to defraud or mislead" by showing that he misled a government agency rather than the purchaser of the drugs. We affirm.

I.

Arlen is a competitive body builder who for years used anabolic steroids. From 1985 through April 1988 Arlen maintained a part-time business of buying, selling, and trading steroids through the mail. The district court found that Arlen's sales to users and other dealers totalled $120,000.

Arlen was careful to avoid having his name associated with the sale of steroids. Arlen conducted all sales and purchases of steroids in cash or blank money orders; he maintained no records of his steroid dealings; he rented a private postal box under a fictitious name to receive steroids and steroid orders; and he used fictitious names and return addresses when sending steroids to customers and suppliers.

In March 1988, agents of the U.S. Food and Drug Administration (FDA) made a controlled purchase, through a cooperating witness, of six different steroids from Arlen. The government executed search warrants in April 1988 and seized additional evidence. Arlen then consented to an interview with government agents, during which he made numerous admissions concerning his illegal steroid business.

In November 1989, a federal grand jury returned an eight count indictment against Arlen. The indictment alleged that Arlen had conspired to commit offenses against the United States, in violation of 18 U.S.C. § 371 (Count 1);[1] used a fictitious name to conduct an unlawful business by means of the postal service, in violation of 18 U.S.C. § 1342 (Counts 2-3); and distributed in interstate commerce, "with the intent to defraud and mislead," misbranded prescription drugs, in violation of 21 U.S.C. §§ 331(a)[2] and 333(b)[3] (Counts 4-8).

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1. Section 371 provides that:
If two or more persons conspire either [1] to commit any offense against the United States, or [2] to defraud the United States, or any agency thereof in any manner or for any purpose, . . . each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
18 U.S.C. § 371 (1966).

2. Section 331 provides that:
The following acts and the causing thereof are prohibited:
(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
21 U.S.C. § 331 (1972). Steroids are prescription drugs because they are unsafe for humans without the supervision of a licensed practitioner. § 353(b)(1)(B). Any prescription drug that is dispensed without a prescription is deemed "misbranded" as a matter of law. § 353(b)(1).

3. Section 333 provides that:
(a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not

In May 1990, the district court ruled that the government could satisfy the specific intent required by § 333(b) by proof that defendant had purposefully evaded the regulatory requirements of the FDA. Arlen pled guilty to Counts 1 and 8 the next day. He conditioned his plea, however, on his right to appeal the district court's pre-trial ruling on the proof necessary to satisfy § 333 (b)'s "intent to defraud or mislead" requirement. Relatedly, he also reserved the right to appeal the district court's conclusion that the indictment passed constitutional muster.

At sentencing in August 1990, the district court announced an upward departure from the Sentencing Guidelines and on each count sentenced Arlen to twelve months imprisonment and three years of supervised release, to run concurrently, and a fine of $25,000. Arlen timely appealed.

II.

[1] Arlen argues first that the district court erred in concluding that the government could establish § 333 (b)'s "intent to defraud or mislead" requirement by showing Arlen's intent to mislead a government agency. Because the issue is one of statutory interpretation, we review the district court's ruling de novo. *In re Exquisito Services, Inc.*, 823 F.2d 151, 152 (5th Cir. 1987).

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more than $1,000, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or *commits such a violation with the intent to defraud or mislead*, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

Section 333 of the Federal Food, Drug, and Cosmetic Act (the Act), provides the penalties for all violations of section 331. Section 333(a) provides a misdemeanor penalty for those who violate § 331 without an intent to "defraud or mislead":

> (a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

Section 333(b), on the other hand, provides a more severe felony penalty for persons who violate § 331 with intent to "defraud or mislead":

> (b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, *or commits such a violation with the intent to defraud or mislead*, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

21 U.S.C. § 333 (1982) (emphasis added).[4] Critically, however, the statute does not specify *who* must be defrauded or misled to trigger the felony provisions of § 333(b). The district court held that the government could satisfy this requirement of § 333(b) by establishing that Arlen had the intent to defraud or mislead a government regulatory agency. Arlen argues that this interpretation is incorrect because the felony provisions of § 333(b) are triggered only if a defendant defrauds or misleads his purchaser.

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4. These provisions are now codified as 21 U.S.C. §§ 333(a)(1) and (a)(2) (1988), respectively.

Although we have not previously decided this question, three other circuits have, and all three have agreed with the government's position here. *See United States v. Bradshaw*, 840 F.2d 871 (11th Cir.), cert. denied, 488 U.S. 924, 109 S. Ct. 305, 102 L.Ed.2d 324 (1988); *United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991); *United States v. Cambra*, 933 F.2d 752 (9th Cir. 1991). In *Bradshaw*, the defendant conducted a wholesale steroid drug business. He took careful steps to avoid detection, including moving from state to state, using mail drops, using false names, and mislabeling packages. At Bradshaw's trial, the trial judge instructed the jury that it could convict Bradshaw of a § 333(b) violation if it found that he intended to defraud or mislead a government agency. On appeal, the Eleventh Circuit examined the section's language, legislative history, and the Act's overall purpose, and upheld the instruction. It concluded that "Congress meant to encompass conduct intended to defraud government enforcement agencies." *Id.* at 874. We find the Bradshaw court's reasoning persuasive.

The government's interpretation of § 333(b) is consistent with the structure of the statute. As previously discussed, section 333(a) provides that anyone who violates a provision of § 331 commits a misdemeanor. Section 333(b) provides that anyone who does so with "intent to defraud or mislead" commits a felony. Several of the twenty acts § 331 proscribes concern only the government. *See* U.S.C. § 331(e) (failure to permit FDA access to records and failure to make reports to the FDA); § 331(f) (refusal to permit FDA inspection); § 331(p) (failure to register with the FDA). As the *Bradshaw* court noted, "[a]fter reading these sections

with § 333, it is clear that the FDA is the entity most likely to be defrauded under these provisions." *Bradshaw*, 840 F.2d at 874. Arlen's interpretation of § 333(b), that the government cannot be a defrauded or misled victim, would lead to the conclusion that there could never be a felonious violation would be contrary to the plain inclusive language of § 333(b), which contemplates both misdemeanor and felony violations for all § 331 offenses.

Arlen relies on our previous decision in *United States v. Haga*, 821 F.2d 1036 (5th Cir. 1987). In *Haga*, however, we did not confront whether the felony provision of § 333(b) is triggered when a defendant defrauds a government agency rather than a purchaser of drugs, and said so explicitly. *Id.* at 1044 n. 17. Rather, *Haga* was a "variance" case and we held only that the district court committed reversible error by convicting the defendant of a prong of the federal conspiracy statute for which he had not been indicted. *Id.* at 1044-46. No such variance occurred here.[5]

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5. Like Arlen, Haga was indicted for conspiring to commit offenses against the United States (in violation of 18 U.S.C. § 371), and for substantive violations of selling steroids (in violation of 21 U.S.C. §§ 331(a), 333(b)). Also similarly, the government in Haga proceeded on a defrauding-the-government theory for the § 333(b) violations. After a bench trial, the district court convicted Haga of a felony conspiracy charge under 18 U.S.C. § 371 and three misdemeanor substantive offenses under 21 U.S.C. § 333(a). Haga was not convicted of a felony under § 333(b).

In reversing Haga's conviction we interpreted the conspiracy statute (§ 371), not the substantive provisions of §§ 331 and 333. See note 1 for the text of 18 U.S.C. § 371. Haga was indicted for *conspiring to commit an offense against the United States* (the first prong), but convicted for *conspiring to defraud the United States* (the second prog). *Haga*, 821 F.2d at 1037, 1044-45. This was reversible error.

Although Arlen contended before the district court and in his brief

In dicta, however, the *Haga* court did question whether the government could establish a § 333(b) violation by showing that the defendant defrauded or misled a government agency. The *Haga* court noted:

> We observe that the theory would as a practical matter have the effect of rendering the "defraud and mislead" language of section 333(b) mere surplusage in the prosecution of any defendant charged with a conscious (and not publicly proclaimed) violation of section 331—only inadvertent (or publicly announced) violations of section 331 would be misdemeanors, because all conscious (and not publicly confessed) violations would necessarily involve a deliberate evasion of established regulatory systems.

Haga, 821 F.2d at 1044 n. 17. The concern is that Congress did not intend to punish all willful violations of § 331 as felonies.

We agree with the government that this result will not follow. While every conscious or willful violation of § 331 will carry a misdemeanor penalty, it will not always subject the violator to a felony sentence. To subject the defendant to a felony sentence requires the government to establish not only that the violation was willful but that it was committed with the specific intent to defraud or mislead an identifiable government agency. *See United States v. Mitcheltree*, 940 F.2d 1329, 1349 (10th Cir. 1991).

For example, an operator of a drug storage facility must permit inspection of his premises when FDA personnel present him with proper credentials and written

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to this court that his conspiracy conviction was also at variance with his indictment, he conceded at oral argument that this was not so. 21 U.S.C. § 333 (1982) (emphasis added).

notice of inspection. If the operator refuses to permit the inspection of his facilities because he feels it is an inconvenient time for an inspection, he has committed a willful violation of § 331(f) failure to permit inspection by FDA), even if his facility fully complies with all FDA regulations. This violation would be punished as a misdemeanor under § 333(a). If, however, the operator refuses to permit inspection because he wants time to clean up his contaminated facility, he has willfully violated § 331(f) with the intent to defraud or mislead the government. This violation would be punished as a felony under § 333(b). Thus we are persuaded that adopting the government's theory will not lead to felonious convictions for all willful violations.

We therefore join our sister circuits' interpretation of § 333(b) and hold that the government's evidence is sufficient to make out a violation of this section where it shows that the defendant intentionally violated § 331 with the specific intent to defraud or mislead an identifiable government agency. *Bradshaw*, 840 F.2d at 874; *Mitcheltree*, 940 R.2d at 1349; *United States v. Cambra*, 933 F.2d 752, 755 (9th Cir. 1991).

[2] Here, Arlen's actions went beyond mere willfulness and constituted active deceptions of the FDA. He was careful not to generate or maintain any records of his steroid dealings. He even stopped accepting blank money orders because "every time you cash them, there's a record." He rented a private postal box under a fictitious name, and used phony names and addresses when mailing steroid packages, These were active steps taken to avoid detection and regulations by the FDA. The district court correctly concluded that the government's proof

of Arlen's intent to defraud a government agency could establish a violation of § 333(b).

III.

Arlen next argues that the district court's interpretation of § 333(b) constructively amended the indictment. He also contends that the indictment is constitutionally insufficient. We address each argument in turn.

A.

[3-5] Arlen contends first that the district court constructively amended Count 8 of the indictment by permitting the prosecution to proceed on a defrauding-the-government theory when the indictment does not allege that theory.

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment. The indictment cannot be "broadened or altered except by the grand jury. *United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988), citing *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S. Ct. 270, 272-73, 4 L.Ed.2d 252 (1960). A constructive amendment occurs when the trial court "through its instructions and facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment." *United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir.), cert. denied, 490 U.S. 1094, 109 S. Ct. 2441, 104 L.Ed. 2d 997 (1989). See e.g., *United States v. Mize*, 756 F.2d 353 (5th Cir. 1985). Here the factual predicate of the indictment is identical to that of the conviction: distribution of misbranded drugs with intent to defraud and mislead. No constructive amendment occurred. *United States v. Young*, 730 F.2d 221, 224 (5th Cir. 1984).

We also find no merit to Arlen's argument that a variance exists between the proof and the indictment. Count 8 of the indictment tracks the language of the statute and alleges an intent to defraud or mislead; it simply does not specify who was defrauded or misled. By producing evidence that Arlen intended to defraud or mislead the government, the prosecution would not vary from the indictment's charges. The indictment alleges that Arlen defrauded or misled someone; the proof would have specified whom that was.

B.

[6, 7] Arlen next challenges the sufficiency of the indictment. He contends that Counts 1 and 8 are constitutionally insufficient because they fail to identify the defrauded or misled victim or to notify him of the government's theory that the victim was a government agency.

As discussed above, the Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment. The Sixth Amendment, in turn, requires that the indictment inform the defendant of the nature of the charges against him. An indictment is sufficient if (1) it contains the elements of the offense charged, (2) it "fairly informs" the defendant of the charge he must meet, and (3) there is no risk of future prosecutions for the same offense. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986), citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 411 Ed.2d 590, 620 (1974). Because Arlen does not argue that he risks double jeopardy, we need consider only the first two requirements.

Arlen argues that Count 8 is insufficient because it gives no hint that the grand jury thought that Arlen had defrauded or misled the government rather than his

purchaser. The indictment tracks the language of the statute.[6] The Count on its face does not specify that Arlen committed his offenses with the intent to defraud or mislead the government. But neither could Arlen reasonably have read this Count as charging him with defrauding the purchaser of the drugs. The indictment is silent as to the identity of the defrauded or misled victim.

An indictment that tracks a statute's words is generally sufficient "as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *United States v. London*, 550 F.2d 206, 210 (5th Cir. 1977). "In other words, the language of the statute may guarantee sufficiency if all required elements are included in the statutory language." *Gordon*, 780 F.2d at 1171.

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6. Count 8 of the indictment alleges:

2. On or about the dates listed below, within the Southern District of Texas, defendant BILLY LEE ARLEN, *with the intent to defraud and mislead*, did introduce and deliver and cause to be introduced and delivered for introduction into interstate commerce from Houston, Texas, to the below-listed locations, quantities of prescription drugs, namely steroids as labeled below, which drugs when introduced and delivered for introduction into interstate commerce, were misbranded with the meaning of Title 21, United States Code, Section 353(b)(1)(B), in that the drugs were dispensed by defendant without a prescription from a practitioner licensed by law to administer such drugs, each such instance as listed below being a separate count of this Indictment.

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COUNT	DATE	DRUG	RECIPIENT
8	3/8/88	Nandrolene Decanoate	Joey Alexander (Starkville, MS)

(Violation: Title 21, United States Code, Sections 331(a) and 333(b), and Title 18, United States Code, Section 2).

The elements of a § 333(b) violation are (1) a violation of § 331, (2) committed by a repeat offender or by someone "with the intent to defraud or mislead." The prosecution must prove beyond a reasonable doubt that a defendant intended to defraud or mislead someone, but the indictment need not specify the intended victim; the focus is on defendant's intent, not the victim's identity. *See United States v. Hatch*, 926 F.2d 387 (5th Cir.), cert. denied,——U.S.——, 111 S. Ct. 2239, 114 U.Ed.2d 481 (1991) (indictment for mail fraud, which requires proof of "any scheme or artifice to defraud," is sufficient even if it fails to define the victim); *United States v. Mizyed*, 927 F.2d 979 (7th Cir.), cert. denied,——U.S.——, 111 S. Ct. 2065, 114 L.Ed.2d 470 (1991) (same). Similarly, the indictment is not insufficient because it fails to identify the means of deceit. *London*, 550 F.2d at 208 (indictment for concealment of material fact by "trick, scheme, or device" not insufficient for failure to specify the precise trick, scheme, or device allegedly used).

Arlen points us to the indictment in *Haga* as an example of a sufficient indictment. That indictment indeed identified the specific government agencies the defendant was charged with defrauding. *Haga*, 821 F.2d at 1042. But "[t]he test is not whether the indictment might have been drawn with greater certainty and exactitude, but rather whether it set forth the elements of the offense charged and sufficiently apprised defendants of the charges. The validity of the indictment must be determined by practical, not technical, considerations." *London*, 550 F.2d at 211 (citation omitted). *Haga* does not establish a base line for required details in an indictment. Count 8 of Arlen's indictment was sufficient to give him ade-

quate notice of the charges.[7] Because Arlen offers no independent reason why Count 1 is insufficient, the above discussion disposes of Arlen's argument on Count 1 as well.

IV. Supervised Release

[8] Arlen next contends that his guilty plea is invalid because the district court did not advise him fully of the effects of supervised release.

At Arlen's plea hearing, the district court explained to him that any sentence of imprisonment would be followed by three years of supervised release in "which you would have to report to a probation officer and follow certain conditions of probation." After an off-the-record discussion between Arlen and his counsel, Arlen indicated that he understood. We held in *United States v. Tuangmaneeratmun*, 925 F.2d 797 (5th Cir. 1991), that the district court must fully inform the defendant at his plea hearing of the prospect of receiving a period of supervised release and the consequences of violating the terms of that release. But unless the district court "totally fails" to address supervised release, a reviewing court will release only if the error is not harmless. *Id.* at 804. Al-

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7. Arlen, understandably, wants the government to disclose its theory of the case and the supporting evidentiary facts. "That is not and never has been required at the indictment stage. . . . The ready remedy of a motion for a bill of particulars [under Fed. R. Crim. P. 7(f)] is available to add specifics beyond those required for the indictment to pass constitutional muster. . . ." *United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982), cert. denied, 461 U.S. 927, 103 S. Ct. 2086, 77 L.Ed.2d 298 (1983). Here, the indictment "taken as a whole . . . adequately apprised [Arlen] of the charges so that [he] might prepare a defense." *London*, 550 F.2d at 208.

Arlen did not request a bill of particulars on this issue, nor even move to quash the indictment; instead, he pled guilty. While not conclusive, this further indicates that the indictment was sufficient. In addition, Arlen admits that he had read the *Bradshaw* opinion well in advance of his plea. The defrauding-the-government theory was not a surprise.

though the district court did not advise Arlen that he would face additional imprisonment if he violated the conditions of supervised release, the court did not totally fail to address the subject of supervised release. Thus Arlen must "demonstrate that he was prejudiced, i.e., that the district court's failure to explain the effect of supervised release caused him to plead guilty when he would not have otherwise done so." *Id.*

Arlen has not met this burden. He was willing to plead guilty with the prospect of receiving a substantial jail sentence. Arlen has not explained why knowledge of all the requirements attendant to supervised release would have caused him to go to trial rather than enter a plea.

VI Sentencing

[9] Finally, Arlen maintains that the district court erred in departing upward from the Sentencing Guidelines on his § 333 violation. Arlen's violation of § 333 was addressed by U.S.S.G. § 2N2.1, "Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product." The district court concluded that, when fashioning § 2N2.1, the United States Sentencing Commission had not considered factors appropriate to a conviction for trafficking in steroids with the intent to defraud or mislead; accordingly, the district court departed from § 2N2.1 and applied the guideline for fraud, § 2F1.1, instead. As we explain below, it was unnecessary for the district court to depart and we need not consider whether a departure was appropriate.

The commentary to § 2N2.1 provides that [i]f the offense involved theft, *fraud*, bribery, revealing trade

secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline." U.S.G. § 2N2.1, Commentary, Application Note 2 (Nov. 1988) (emphasis added). Arlen was convicted of an offense involving intent to defraud or mislead. The district court specifically found that "[i]n addition to being an element of the offense, fraud was a factual matter, defining characteristic, of both specific nature of defendant's conduct and the black market world in which he conducted his illicit steroid business." Thus the district court property applied the § 2F1.1 fraud guideline, rather than § 2N2.1, for the violation of 333.[8] Another court has already approved such an applicaiton. *United States v. Cambra*, 933 F.2d 752, 755 (9th Cir. 1991). Applying the fraud guideline for a violation of § 333(b) is a direct application of the Guidelines, rather than a departure from them, and leaves Arlen without a basis for objection.

[10] Arlen also contends that his sentence was disproportionately high when compared to the sentences received by other, more-culpable coconspirators. The district court sentenced Arlen to 12 months, well within the 10-16 month guideline range. Arlen cannot attack his own guideline range sentence based upon the sentences of his coconspirators. *United States v. Pierce*, 893 F.2d 669, 678 (5th Cir. 1990).

Accordingly, the judgment of the district court is

AFFIRMED.

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8. We note that under the current version of the Guidelines, sentencing courts are directed to § 2F1.1 for violations of § 333(b) (now codified as § 333(a)(2)). United States Sentencing Commission, Guidelines Manual, Appendix A (Nov. 1, 1990). This provision however, is inapplicable to the case sub judice.